

2003

Tiffany Jacobs Dinner v. Erich Ross Dinner : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Brian M. Barnard, James L. Harris Jr.; Utah Legal Clinic; Attorneys for Respondent/Appellant.
John W. Call; Nygaard, Coke & Vincent .

Recommended Citation

Brief of Appellant, *Dinner v. Dinner*, No. 20030330 (Utah Court of Appeals, 2003).
https://digitalcommons.law.byu.edu/byu_ca2/4303

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

TIFFANY JACOBS DINNER,

Petitioner/Appellee,

vs.

ERICH ROSS DINNER,

Respondent/Appellant.

:

:

BRIEF OF APPELLANT

:

20030330-CA

:

:

:

AN APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER (3/25/2003), BY THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH, SALT LAKE DEPARTMENT,
The Hon. Frank G. Noel, Judge, presiding.

(Trial Court Case No. 98-490-1948 DA)

BRIAN M. BARNARD USB # 0215
JAMES L. HARRIS, JR. USB # 8204
UTAH LEGAL CLINIC
Attorneys for Respondent/Appellant
214 East Fifth South Street
Salt Lake City, Utah 84111-3204
Telephone: (801) 328-9531

JOHN W. CALL
NYGAARD, COKE & VINCENT, L.C.
Attorneys for APPELLEE
333 North 300 West
Salt Lake City, Utah 84103

OCT - 2

ORAL ARGUMENT REQUESTED

IN THE UTAH COURT OF APPEALS

TIFFANY JACOBS DINNER,

Petitioner/Appellee,

vs.

ERICH ROSS DINNER,

Respondent/Appellant.

:

:

BRIEF OF APPELLANT

:

20030330-CA

:

:

:

AN APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER (3/25/2003), BY THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH, SALT LAKE DEPARTMENT,
The Hon. Frank G. Noel, Judge, presiding.

(Trial Court Case No. 98-490-1948 DA)

BRIAN M. BARNARD USB # 0215
JAMES L. HARRIS, JR. USB # 8204
UTAH LEGAL CLINIC
Attorneys for Respondent/Appellant
214 East Fifth South Street
Salt Lake City, Utah 84111-3204
Telephone: (801) 328-9531

JOHN W. CALL
NYGAARD, COKE & VINCENT, L.C.
Attorneys for APPELLEE
333 North 300 West
Salt Lake City, Utah 84103

ORAL ARGUMENT REQUESTED

LIST OF PARTIES IN THE COURT BELOW

The following is a complete list of the parties in the proceedings before the Third Judicial District Court:

JUDGE

The HON. FRANK G. NOEL, Judge Presiding, Third Judicial District, Salt Lake Department.

PARTIES

1. ERICH ROSS DIENER, respondent, represented by Utah Legal Clinic, Brian M. Barnard, and James L. Harris, Jr., Attorneys at Law.

2. TIFFANY JACOBS DIENER, petitioner, represented by John W. Call, of Nygaard, Coke & Vincent, L.C.

PRIOR OR RELATED APPEALS

There are no prior or related appeals.

TABLE OF CONTENTS

	Page
LIST OF PARTIES BELOW	ii
PRIOR OR RELATED APPEALS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
BRIEF OF APPELLANT	1
STATEMENT OF JURISDICTION	1
ISSUES PRESENTED FOR REVIEW	1
ISSUES RAISED AND CONSIDERED	3
STANDARD OF REVIEW	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	6
I. GENERAL FACTS	6
II. FACTS RE: INCREASED CHILD SUPPORT AS A BARGAINED-FOR EXCHANGE	7
A. TESTIMONY IN SUPPORT OF THE COURT'S FINDING (MARSHALING REQUIREMENT)	8
B. TESTIMONY/EVIDENCE DETRACTING FROM THE COURT'S FINDING	11
III. FACTS RE: SUBSTANTIAL CHANGE IN CIRCUMSTANCES	13
A. CHANGE IN ERICH DIENER'S CIRCUMSTANCES	13
B. CHANGE IN TIFFANY DIENER'S CIRCUMSTANCES	16
SUMMARY OF THE ARGUMENT	17
ARGUMENT	19

TABLE OF CONTENTS - CONTINUED

	Page
I. ERICH DIENER IS ENTITLED TO AN ADJUSTMENT IN CHILD SUPPORT PURSUANT TO UTAH LAW AFTER THE PASSAGE OF THREE (3) YEARS	19
II. THE LOWER COURT ERRED IN FINDING A BARGAINED-FOR EXCHANGE OF ALIMONY FOR INCREASED CHILD SUPPORT	20
III. THE LOWER COURT ERRED IN FAILING TO FIND A SUBSTANTIAL CHANGE IN THE PARTIES' CIRCUMSTANCES	24
A. UTAH LAW ALLOWS AN ADJUSTMENT BASED UPON A SUBSTANTIAL CHANGE TO THE PARTIES' CIRCUMSTANCES	25
B. APPLICATION TO ERICH DIENER	26
C. APPLICATION TO TIFFANY DIENER	27
IV. THE BEST INTERESTS OF THE CHILD CAN BE MET BY A REDUCTION OF CHILD SUPPORT	27
V. AN INJUSTICE WILL BE PERPETRATED UPON MR. DIENER IF THE TRIAL COURT'S RULING IS ALLOWED TO STAND	36
CONCLUSION AND RELIEF SOUGHT	37
REQUEST FOR ORAL ARGUMENT	39
CERTIFICATE OF MAILING	40
APPENDIX/ATTACHMENTS	41
Attachment "A": Petition to Modify (R. 43).	
Attachment "B": Findings of Fact, Conclusions of Law and Order (R. 202).	
Attachment "C": Decree of Divorce (R. 33).	
Attachment "D": Stipulation and Settlement Agreement (R. 10).	
Attachment "E": Original Findings of Fact and Conclusions of Law (R. 26).	

TABLE OF AUTHORITIES

CASES	Page
<u>Acton v. Deliran</u> , 737 P.2d 996 (Utah 1987)	24
<u>Humberger v. Humberger</u> , 995 P.2d 809 (Idaho 2000)	35
<u>Jones v. Jones</u> , 700 P.2d 1072 (Utah 1985)	22, 23
<u>Kessimakis v. Kessimakis</u> , 977 P.2d 1226 (Ut. Ct. App. 1999)	3, 4
<u>Little v. Little</u> , 975 P.2d 108 (Ariz. 1999)	34
<u>Overby v. Overby</u> , 698 So.2d 811 (Fl. 1997)	32, 33
<u>Rucker v. Dalton</u> , 598 P.2d 1336 (Utah 1979)	24
<u>State v. Pena</u> , 869 P.2d 932, 936 (Utah 1994)	4
<u>Wilde v. Wilde</u> , 969 P.2d 438, 442 (Utah Ct. App. 1998)	4
<u>Williamson v. Williamson</u> , 372 Utah Adv. Rep. 45 (Ut. Ct. App. 1999)	3
<u>Wood v. Wood</u> , 272 So.2d 14 (Fla. 3d DCA 1973)	31, 32
UTAH STATUTORY PROVISIONS	
Utah Code Ann. § 78-2A-3 (1953 as amended)	1
Utah Code Ann. § 78-45-7.2(6) (1953 as amended)	passim
Utah Code Ann. § 78-45-7.2(7) (1953 as amended)	passim
MISCELLANEOUS	
16 J. Am. Acad. Matrimonial Law 259	31
Lewis Becker, <u>Spousal and Child Support and the "Voluntary Reduction of Income" Doctrine</u> , 29 Conn. L. Rev. 647 (1997)	34
Florida Stat. Ann. § 61.13	31, 32
Kan. Stat. Ann. § 38-1121	31
Nev. Rev. Stat. § 125B.145	31

IN THE UTAH COURT OF APPEALS

	:	
	:	
TIFFANY JACOBS DINNER,	:	BRIEF OF APPELLANT
Petitioner/Appellee,	:	20030330-CA
vs.	:	
	:	
ERICH ROSS DINNER,	:	
Respondent/Appellant.	:	
	:	

AN APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (3/25/2003), BY THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, SALT LAKE DEPARTMENT, The Hon. Frank G. Noel, Judge, presiding.

(Trial Court Case No. 98-490-1948 DA)

Respondent/Appellant, Erich Diener, by and through counsel, submits the following brief:

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3 (2) (h) (1953 as amended).

ISSUES PRESENTED FOR REVIEW

1) Whether the evidence presented at the 2003 trial on Erich Diener's petition to modify supports the trial court's findings that the parties entered into an "agreement" at the time

of the 1998 divorce regarding child support. Whether the evidence presented at trial supports the trial court's findings that there was a bargained-for exchange regarding child support at the time of divorce. If so, what are the terms of this agreement?

2) Whether the trial court's factual findings support the conclusions of law denying Erich Diener's request to adjust his child support obligation.

3) Whether the trial court erred in refusing to apply Utah Code Ann. § 78-45-7.2(6) (1953 as amended) and the right to a recalculation of child support after three (3) years passage from the date of a decree regardless of any change in circumstances of the parties.

4) Whether the trial court erred in finding "no substantial change in circumstances upon which to justify modification of the child support" under Utah Code Ann. § 78-45-7.2(7) (1953 as amended).

5) Whether the trial court erred in its narrow application of Utah Code Ann. § 78-45-7.2(7) (1953 as amended) solely to Mr. Diener's financial circumstances and not to the overall change in both parties' circumstances.

6) Did the trial court misconstrue Mr. Diener's stipulation regarding amounts to be used for the child support calculation?

7) Is it ever in the child's best interest to reduce child support?

ISSUES RAISED AND CONSIDERED

The foregoing issues were raised in Mr. Diener's Petition to Modify Decree (R. 43), Motion for Summary Judgment (R. 62), Trial Memorandum (R. 153), at trial (Transcript), Defendant's Additional Requested Findings of Fact and Objections (R. 167) and Defendant's Objections to Plaintiff's Findings of Fact (R. 184).

The issues were considered and ruled upon by the court in the Findings of Fact, Conclusions of Law and Order¹ (R. 202).

STANDARD OF REVIEW

1) The trial court's findings of fact in a divorce action are reviewed under a clearly erroneous standard. Kessimakis v. Kessimakis, 977 P.2d 1226, 1228 (Utah Ct. App. 1999). The trial court, however, must have made adequately detailed findings on each issue so that the Court of Appeals can determine if those findings were rationally based upon applicable factors. Williamson v. Williamson, 372 Utah Adv. Rep. 45, 46 (Utah Ct. App. 1999).

2) The conclusions of law that flow from the findings are reviewed for correctness and are given no special deference on

¹ Defendant's objections were partially overruled in a minute entry (R. 181) and in a hand written denial on the last page of the 3/25/2003 Order (R. 209).

appeal. Kessimakis v. Kessimakis, 977 P.2d 1126, 1228 (Utah Ct. App. 1999); Wilde v. Wilde, 969 P.2d 438, 442 (Utah Ct. App. 1998). Correctness "means the appellate court decides that matter for itself and does not defer in any degree to the trial judge's determination of law." State v. Pena, 869 P.2d 932, 936 (Utah 1994).

STATEMENT OF THE CASE

1) The parties were divorced in a stipulated decree entered on April 17, 1998. Decree (R. 33).

2) There was one (1) child born during the marriage, Zoe-Nicene Lois Diener, dob 2/19/1995. Decree, p. 2 (R. 34).

3) In the decree, Erich Diener was ordered to pay \$400.00 per month for child support to petitioner/appellee Tiffany Diener for the parties' one (1) child. The child support exceeded the Utah Child Support Guidelines. Decree, p. 2 (R. 34).

4) Erich Diener filed a Petition to Modify the Divorce Decree on December 4, 2001. Petition to Modify (R. 43).

5) Erich Diener sought a reduction in child support, a change in the requirements regarding life insurance, a termination of the requirement for the parties to contribute to a college fund for the child, and the right to claim the child for alternate tax years. Petition to Modify Decree, p. 2-4 (R. 44-46).

6) More than three (3) years had elapsed since the entry of the decree at the time Mr. Diener filed his Petition to Modify. Findings of Fact, Conclusions of Law and Order, dated 3/25/2003, p. 2 (R. 203).

7) The Petitioner/Appellee Tiffany Diener moved the court to dismiss (R. 50). Mr. Diener moved for summary judgment (R. 62). Both motions were denied on or about April 1, 2002. Order Denying Motion to Dismiss (R. 90).

8) The matter came before the court for trial on February 6, 2003.

9) Based upon that trial, the court issued an Order dated March 25, 2003, entitled Findings of Fact, Conclusions of Law and Order, dated 3/25/2003 (hereinafter "3/25/2003 Order") (attached hereto as Exhibit "B"; see also R. 202).

10) The court:

Denied Mr. Diener's Petition to Modify the child support. 3/25/2003 Order, p. 7 (R. 208).

Denied Mr. Diener's Petition to Modify the tax deduction as to Mr. Diener's request to alternate tax years.² 3/25/2003 Order, p. 7 (R. 208).

² The Court did order that Mr. Diener could purchase the right to claim the child for tax purposes but declined to establish a procedure to do so.

Granted the request to suspend the requirement that the parties contribute to a college fund for the child. 3/25/2003 Order, p. 7 (R. 208).

Granted the request regarding the maintenance of life insurance (each party is now only required to obtain such insurance only if it is available through the parties' employers at a reasonable cost). 3/25/2003 Order, p. 7 (R. 208).

11) This timely appeal followed. Notice of Appeal (R. 210).

STATEMENT OF FACTS

I. GENERAL FACTS:

1. The parties were granted a divorce on April 17, 1998. Decree of Divorce (hereinafter "Decree") (R. 33), Trial Transcript, p. 4 (hereinafter "Transcript"; the transcript of the 2003 trial on Erich Diener's Petition to Modify is found in the record on appeal beginning at R. 220).

2. One child was born during the marriage. The child's name and date of birth are:

Zoe-Nicene Lois Diener, February 19, 1995.
Petition for Dissolution of Marriage, p. 1 (R. 1), Decree, p. 2 (R. 34).

3. The decree of divorce set child support "in the amount of \$400.00 per month" Decree, p. 2 (R. 34) That amount exceeded the Utah Support Guidelines. Decree, p. 2 (R. 34; see also Transcript, p. 17). The Decree and the Findings set out no reason why the amount exceeds the Guidelines (R. 26 & 33).

II. FACTS RE: INCREASED CHILD SUPPORT AS A BARGAINED-FOR-EXCHANGE:

The Court in the 2003 modification proceeding made the following finding:

The higher child support amount was a bargained-for consideration where each of the parties made significant concessions in reaching that agreement. Ms. Diener agreed not to pursue claims for alimony or additional property settlement, based upon Mr. Diener's use of Ms. Diener's pre-marital assets, and Mr. Diener agreed to pay a higher monthly child support amount in order to be relieved of the risk of such claims by Ms. Diener being successful.

3/25/2003 Order, p. 2 (R. 203).³ The court then concluded "it would be inequitable to apply to provisions of § 78-45-7.2(6), Utah Code, to reduce Mr. Diener's child support obligation, inasmuch as doing so would provide Mr. Diener with the benefits of the bargain without requiring its corresponding obligations." 3/25/2003 Order, p. 5 (R. 206).

³ Discussed more fully below, none of the additional findings support this finding. Rather, the additional findings support Mr. Diener's allegation that there has been a substantial change to the parties' circumstances.

There was no finding in the original Findings of Fact in 1998 supporting the decree with regard to any such bargain (see R. 26). There is no indication of any such bargain in the parties' Stipulation and Settlement Agreement (see R. 10). Finally, there is no indication of any such bargain in the parties' Decree of Divorce (see R. 33).

A. TESTIMONY IN SUPPORT OF THE COURT'S FINDING (MARSHALING REQUIREMENT):

1. Tiffany Diener was aware that the child support amount ordered in the Decree was higher than the amount provided by the Utah Child Support Guidelines. Transcript, p. 5.

2. Erich Diener testified, "I am aware that the divorce decree required I pay \$400.00 a month in child support." Transcript, p. 17. He testified, "At some time during the entire proceedings I know I must have become aware of the fact that it was more." Transcript, p. 38.

3. Erich consulted with a JAG attorney while stationed at Fort Meade, Maryland in the Fall of 1997 regarding divorce. Erich was not represented by counsel at the time of the divorce decree or in the original proceeding. Transcript, p. 4 & 16.

4. Erich told Tiffany that he did not want her to pursue a claim for alimony. Transcript, p. 35.

5. There was approximately \$110,000.00 in Tiffany's trust account when she reached the age of majority in 1992, two (2) years before the parties' marriage. Transcript, p. 35, 57.

6. Prior to the marriage, Tiffany bought Erich a used 1970 a Toyota Land Cruiser. The value of the vehicle was approximately \$2,000.00 to \$2,400.00. Transcript, p. 35, 51-52 & 57. The vehicle was purchased in 1993, whereas the parties were married on July 2, 1994. Transcript, p. 62.

7. Before the parties' marriage, Tiffany paid a portion of Erich's tuition while he attended Harvard University for one (1) semester. Transcript, p. 36.

8. Erich attended Harvard University for one (1) semester in 1992 right after high school. Tiffany paid \$5,000.00 toward tuition and airfare on behalf of Erich. Transcript, p. 55-56.

9. Tiffany characterized the \$5,000.00 as a loan that was "an investment in him and our future together." Transcript, p. 56 & 61. She testified, "We had talked about marriage, and he had said that he would make it up to me." Transcript, p. 56.

10. Tiffany testified that the 1970 Land Cruiser was not a gift. She testified that when the vehicle was sold, Erich gave her half of the sales price, \$1,200.00. Transcript, p. 56-57.

11. Tiffany testified that in early 1998 the parties spoke extensively about the terms of the pending divorce. Transcript,

p. 58. Erich's testimony does not dispute this assertion.

Transcript, p. 34.

12. Tiffany testified that Erich Diener brought up the amount of \$400.00 in child support. Transcript, p. 58-59. Erich's testimony does not dispute this assertion. Transcript, p. 34. Responding to the proposed amount child support, Tiffany testified, "I laughed. I said that's ridiculous with all that he owed me. I said, 'If I still had my trust fund, I would - - I could live off much more than that just from the interest.'" Transcript, p. 59.

13. Tiffany testified, "I discussed both alimony and property claims. [Erich Diener] wanted me not to pursue those in exchange for a higher amount of child support." Transcript, p. 59.

14. Tiffany did not make a claim for alimony in the divorce action. Transcript, p. 38.⁴

⁴ The Stipulation and Settlement Agreement (R. 10) specifically decline alimony: "This is a brief marriage of 3-1/2 years duration. The parties are able-bodied and able to provide for their own support and neither shall pay alimony to the other." Stipulation, p. 4 (R. 13). The original Findings of Fact reads identical (R. 29). Finally, the Decree of Divorce declines alimony. Decree, p. 3 (R. 35).

15. If Erich is permitted to reduce child support from \$400.00, Tiffany will seek to assert claims for alimony and/or property settlement. Transcript, p. 60.

B. THE FOLLOWING TESTIMONY/EVIDENCE DETRACTS FROM THE COURT'S FINDING:

16. Tiffany was represented by counsel at the time of the divorce decree. Transcript, p. 4 & 16. Erich was not. Transcript, p. 4 & 16.

17. The marital debts listed in the Divorce Decree totaled approximately \$11,400.00. Decree, p. 4 (R. 36). Of those, Tiffany was ordered to pay \$3,350.00. Transcript, p. 9; Decree, p. 4 (R. 36). Erich was ordered to pay the remaining balance. Id.

18. There is no mention or indication of pre-marital debts (if indeed such existed) in the decree. See Decree (R. 36); Transcript, p. 9.

19. There is no mention of any debts (if indeed such existed), that Erich owed to Tiffany in the decree. Transcript, p. 9.

20. Erich testified that he did not use Tiffany's trust account. Transcript, p. 35.

21. Before the parties' marriage on July 2, 1994, Tiffany's trust account was entirely depleted. Transcript, p. 48, 57 & 63.

22. Erich testified that the used 1970 Land Cruiser was a gift. Transcript, p. 49-50. He was not present when the vehicle was purchased. Transcript, p. 51-52.

23. Tiffany testified that Erich gave \$1,200.00 to Tiffany at the time he sold the vehicle. Transcript, p. 57. Erich testified that he did not recall ("I don't know. I don't know if I gave her any"). Transcript, p. 52.

24. The used Land Cruiser was purchased prior to the parties' marriage. Transcript, p. 62.

25. There is no mention of the Land Cruiser or a related debt in the decree. Transcript, p. 62-63.

26. Erich had no discussions with Tiffany in negotiations for settlement of the divorce regarding increased child support in exchange for waiver of alimony. Transcript, p. 42-43.

27. Rather, Erich testified, "I . . . said not to worry too much that she didn't have [the trust fund] anymore because . . . at the time . . . I wanted to be a doctor." Transcript, p. 43. These statements were made by Erich prior to and during the marriage, not at the time of the divorce. Id.

28. The money that Tiffany paid to help Erich attend Harvard for a semester was an "investment in [the parties'] future." Transcript, p. 61.

29. There is no mention of the "Harvard" money in the decree. Transcript, p. 62.

30. The Stipulation and Settlement Agreement (R. 10), original Findings of Fact and Conclusions of Law (R. 26) and Decree (R. 33) all implicitly deny alimony. The Decree reads, "The parties are able-bodied and able to provide for their own support, and it is ordered that neither party pay alimony to the other." Decree, p. 3 (R. 35).

III. FACTS RE: SUBSTANTIAL CHANGE IN CIRCUMSTANCES:

A. CHANGE IN ERICH DIENER'S CIRCUMSTANCES:

1. At the time of the divorce Erich was in the military. Transcript, p. 4-5, 16. Throughout the marriage, Erich was in the United States Army. Transcript, p. 17.

2. Erich's base monthly income at the time of the divorce was \$1,192.00. Transcript, p. 17. In addition, to the base income, Erich received a housing allowance. Transcript, p. 17. With the housing allowance, Erich's income was approximately \$1,700.00 per month. Transcript, p. 17-18. Thus, the divorce decree reflected income of \$1,700.00 per month for Erich. Transcript, p. 18.

3. Erich was discharged from the military in April 1998. Transcript, p. 9, 17-18.

4. From April until about June of 1998, Erich was employed by Circuit City as a salesman earning \$1,200.00 gross per month. Transcript, p. 18.

5. From June 1998 until September 2001, Erich was employed by TEKsystems. Transcript, p. 18-19.

6. When first employed, Erich earned \$12.00 per hour for TEKsystems. When Erich was terminated, he was earning \$55,000.00 annually. Transcript, p. 19.

7. Erich's termination with TEKsystems in 2001 was the result of a reduction in force. Transcript, p. 19.

8. Erich was unable to find employment in the same field. Erich looked repeatedly for work in said field. Erich did not qualify for such employment in the constricted job market. The jobs for which Erich did apply, required a Bachelor's Degree. Transcript, p, 19-21.

9. Erich returned to college shortly after being laid off from TEKsystems. Transcript, p. 21 & 28.

10. Erich was employed at Tucci's Italian Restaurant from November 2001 to October/September 2002. Erich was a bartender and waiter. He worked shifts that would enable him to attend college. Transcript, p. 21-22.

11. Erich's average income at Tucci's was \$10.00 per hour. Erich worked approximately twenty to thirty (20-30) hours per

week at Tucci's. Transcript, p. 22. Erich terminated his employment in September 2002 with Tucci's. Transcript, p. 22.

12. During 2002, Erich temporarily worked part-time again for TEKsystems from May 2002 until about October 2002. Erich was paid \$20.00 per hour for this limited work, for a total amount of about \$3,655.00 in 2002. Transcript, p. 24.

13. After October 2002, TEKsystems did not offer Erich any other employment. Transcript, p. 24.

14. Erich has provided computer assistance to Brian Barnard's law office, his counsel in this matter, in exchange for attorney fees. The total amount credited for 2001 and 2002 was \$1,200.00 and \$1,912.50 respectively. Transcript, p. 25.

15. Erich enlisted in the National Guard in September 2002, with an obligation of one (1) weekend a month and two (2) weeks each summer. Erich's compensation from the National Guard is approximately \$250.00 per month. Transcript, p. 26.

16. At the time of trial, Erich was employed part-time at The Gateway Academy, a residential treatment center for teenage boys. Erich earns approximately \$10.00 per hour and works about 24 hours a week on the graveyard shift. Transcript, p. 26-27. Erich does not have any fringe benefits available to him through that employment. Transcript, p. 27.

17. Erich is currently a full-time student at the University of Utah working towards a Bachelor's Degree. Transcript, p. 28. His anticipated graduation is Spring of 2004. Transcript, p. 29.

18. While attending the University of Utah, Erich has incurred student loans of about \$13,000.00. Transcript, p. 50. Those student loans have been utilized by Erich to attend school, pay bills, and to meet other current living expenses. Transcript, p. 50.

B. CHANGE IN TIFFANY DIENER'S CIRCUMSTANCES:

19. At the time of the divorce, Tiffany was employed as a nanny. Transcript, p. 5.

20. At the time of the divorce, Tiffany earned \$1,192.00 per month. Transcript, p. 6. Tiffany also received at no cost room and board for herself and the parties' daughter. Transcript, p. 6.

21. Tiffany is currently unemployed. Transcript, p. 7. She has been unemployed since quitting the above nanny job in June of 2001. Transcript, p. 7.

22. Tiffany is currently a full-time student at the University of Utah. Transcript, p. 7-8.

23. Tiffany does not have any disability or physical impairment that would prevent her from working. Transcript, p. 8-9.

24. The parties' child is a normal, healthy child who attends full time traditional school. Transcript, p. 10.

SUMMARY OF THE ARGUMENT

The lower court erred in denying Erich Diener's petition to modify the decree to adjust child support. Erich Diener is entitled to an adjustment of child support based upon the passage of three (3) years and the non-temporary difference of 10%. Those who owe child support are entitled to a review and an adjustment once every three (3) years if there is a difference of 10% or more between the amount previously ordered and the recalculated amount under the guidelines. There is no requirement of a substantial change in the parties circumstances to effect this change.

The lower court erred in finding a bargained-for exchange of alimony for increased child support. The evidence presented, and the original divorce documents, do not support such a finding. There is no indication of said bargain in the original divorce documents (Stipulation and Settlement Agreement (R. 10), Findings of Fact (R. 29), and Decree of Divorce (R. 33)). The fact that

there is no suggestion of such a bargain in the original divorce documents is fatal to Tiffany Diener's current assertion that the parties entered into a pre-divorce agreement.

The lower court erred in failing to find a substantial change in the parties' circumstances. Utah law allows an adjustment to child support based upon a substantial change to the parties circumstances. If the court finds such a change, it must determine whether the change results in a difference of 15% or more between the amount of child support ordered and the amount that would be required under the guidelines. If there is such a difference, the court shall adjust the amount of child support to that which is provided for in the guidelines.

Erich Diener's situation has substantially changed. Tiffany Diener's situation has substantially changed. In addition, the trial court erred in solely examining Erich Diener's financial circumstances, and not the overall change in both parties' circumstances.

The best interests of the child can be met by a reduction of child support. Erich Diener is neither voluntarily unemployed, nor voluntarily underemployed. The trial court specifically found that Mr. Diener requires a college degree to obtain gainful employment at a reasonable rate of pay. Erich Diener's decision

to return to school will ultimately benefit the child by providing greater earning capacity.

Finally, an injustice will be perpetrated if the trial court's ruling is allowed to stand. Assuming *arguendo* that Erich Diener indeed incurred an obligation to Tiffany Diener prior to the marriage, at some point it will be repaid through the increased support. After repayment, Tiffany Diener will be unjustly enriched by continued, excessive child support.

ARGUMENT

I. THE LOWER COURT ERRED IN DENYING ERICH DIENER'S REQUEST TO MODIFY CHILD SUPPORT. ERICH DIENER IS ENTITLED TO AN ADJUSTMENT IN CHILD SUPPORT PURSUANT TO UTAH LAW AFTER THE PASSAGE OF THREE (3) YEARS:

Erich Diener is entitled to an adjustment of child support based upon the passage of three (3) years and the non-temporary difference of 10%. Under Utah law, those who owe an obligation of, or receive, child support are entitled to a review and an adjustment once every three (3) years if there is a difference of 10% or more between the amount previously ordered and the recalculated amount under the guidelines. There is no requirement of a substantial change in the parties' circumstances to effect this change. The pertinent statute reads as follows:

(6) (a) If a child support order has not been issued or modified within the previous three years, a parent, legal guardian, or the office may petition the court to adjust the amount of a child support order.

(b) Upon receiving a petition under Subsection (6)(a), the court shall, taking into account the best interests of the child, determine whether there is a difference between the amount ordered and the amount that would be required under the guidelines. If there is a difference of 10% or more and the difference is not of a temporary nature, the court shall adjust the amount to that which is provided for in the guidelines.

(c) A showing of a substantial change in circumstances is not necessary for an adjustment under Subsection (6)(b).

Utah Code Ann. § 78-45-7.2 (6)(a)-(c) (1953 as amended). The statute mandates an adjustment to child support if the 10% criteria is met: "If there is a difference of 10% or more and the difference is not of a temporary nature, the court shall adjust the amount to that which is provided for in the guidelines." Id. (emphasis added).

Thus, in light of the passage of three (3) years from the date the decree was entered herein, the court below erred by refusing to recalculate child support pursuant to the guidelines and order Erich Diener to pay the resulting amount.

II. THE LOWER COURT ERRED IN FINDING A BARGAINED-FOR EXCHANGE OF ALIMONY FOR INCREASED CHILD SUPPORT.

The lower court found that

The higher child support amount was a bargained-for consideration where each of the parties made significant

concessions in reaching that agreement. Ms. Diener agreed not to pursue claims for alimony or additional property settlement, based upon Mr. Diener's use of Ms. Diener's pre-marital assets, and Mr. Diener agreed to pay a higher monthly child support amount in order to be relieved of the risk of such claims by Ms. Diener being successful.

3/25/2003 Order, p. 2 (R. 203).

The court concluded "it would be inequitable to apply to provisions of § 78-45-7.2(6), Utah Code, to reduce Mr. Diener's child support obligation, inasmuch as doing so would provide Mr. Diener with the benefits of the bargain without requiring its corresponding obligations." 3/25/2003 Order, p. 5 (R. 206).

The evidence presented, and the original divorce documents, do not support such a finding. There was no finding in the 1998 Findings of Fact with regard to any such bargain (see R. 26). There is no indication of any such bargain in the parties' Stipulation and Settlement Agreement (see R. 10). Finally, there is no indication of any such bargain in the parties' Decree of Divorce (see R. 33). None of these documents mention this "agreement." Indeed, the Stipulation and Settlement Agreement (R. 10) specifically denies alimony: "This is a brief marriage of 3-1/2 years duration. The parties are able-bodied and able to provide for their own support and neither shall pay alimony to the other." Stipulation, p. 4 (R. 13). The Findings of Fact reads identical (R. 29). Finally, the Decree of Divorce

specifically denies alimony. Decree, p. 3 (R. 35) ("The parties are able-bodied and able to provide for their own support, and it is ordered that neither party pay alimony to the other").

There was no basis for an award of alimony at the time of the original decree. Given the parties' ages, health, earning abilities, and the duration of the marriage, an alimony award, if made, would have been for a short period of time and in a very modest amount. Tiffany Diener's potential claim for alimony was so slight as to be inconsequential.

In consideration of the Petition to Modify, the trial court relied solely upon the *ad hoc*, post divorce recollection of Tiffany Diener to find the agreement. The fact that there is no suggestion of such a bargain in the Settlement Stipulation, Findings of Fact, and the Decree of Divorce is fatal to Tiffany Diener's *ad hoc* assertion that the parties entered into a pre-divorce agreement. Instruction is found in the case Jones v. Jones, 700 P.2d 1072 (Utah 1985). In that case, the appellant claimed, *inter alia*, that the trial court improperly distributed certain property. In its review, the Utah Supreme Court noted that findings of fact generally must include valuation of assets in order to permit appellate review. In the Jones case, however, trial counsel for the party appealing "prepared . . . inadequate findings of fact . . . conclusions of law and decree of divorce,

all of which the court entered without alteration." Id. at 1074. The Supreme Court declined to upset the property distribution, concluding appellant's claim had been waived because the party seeking review/reversal failed to adequately prepare the findings of fact, etc. Id. at 1074-75.

By analogy, the same is true herein. Tiffany Diener seeks to establish and then enforce an "agreement" that was nowhere delineated in the original Stipulation and Settlement Agreement (R. 10), Findings of Fact (R. 26) and Decree of Divorce (R. 33).⁵ These documents were prepared by Tiffany Diener's trial counsel. Any questions as to construction, should be resolved against Ms. Diener. Any failures therein should be construed against Ms. Diener. By failing include any terms (if indeed they ever existed) of the parties' alleged agreement, Ms. Diener waived her right to assert such a claim. The failure to include such terms is fatal to Ms. Diener's current claim otherwise.⁶

⁵ Similarly, the original divorce papers contain no mention of the 1970 Land Cruiser, the "Harvard" money, or any pre-marital debts (if indeed any such existed).

⁶ The error is compounded by the recent judicial review. Herein, the lower court fails to find and/or delineate any specifics of the parties alleged agreement.

What are the terms of the increased support agreement between the parties which supposedly formed the basis of the original settlement stipulation and decree? Neither the original decree nor the recent findings recite the terms of this agreement. Did Erich agree to pay increased child support until

The trial court erred in finding a bargained-for exchange of higher child support for alimony.

III. THE LOWER COURT ERRED IN FAILING TO FIND A SUBSTANTIAL CHANGE IN THE PARTIES' CIRCUMSTANCES:

The lower court made the following Conclusion of Law

Because the Defendant's financial circumstances have not changed substantially, the Court finds that there is no substantial change in circumstances upon which to justify modification of the child support Order under § 78-45-7.2(7), Utah Code.

3/25/2003 Order, p. 6 (R. 207). Such a conclusion does not flow from the testimony presented at trial, nor does it flow from the subsidiary findings made by the court.⁷

the child reaches the age of eighteen (18)? Did he agree to the increase regardless of his ability to work? What if Erich became physically disabled and unable to work? Did Tiffany agree that child support would never increase beyond the \$400.00 per month. What if Erich began earning \$100,000.00 per year? Is Tiffany precluded from seeking increased child support? Would Erich be required to pay child support beyond the guidelines based upon his greatly increased income? The same excess amount? A percentage increased amount?

These and similar questions which depend upon the terms of the alleged agreement can not be answered. The agreement is indefinite and amorphous and so lacking in terms to be unenforceable.

⁷ The Utah Supreme Court, in Acton v. Deliran, 737 P.2d 996 (Utah 1987), stated that findings "should be sufficiently detailed and includes enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." Id. at 999 (quoting Rucker v. Dalton, 598 P.2d 1336, 1338 (Utah 1979)). In its findings, the court below must clearly articulate the reasons for disregarding the Stipulation and Settlement Agreement. The trial court fails in this regard.

A. UTAH LAW ALLOWS AN ADJUSTMENT BASED UPON A SUBSTANTIAL CHANGE TO THE PARTIES' CIRCUMSTANCES:

Utah law allows an adjustment to child support based upon a substantial change to the parties' circumstances. The relevant statute reads as follows:

(7) (a) A parent, legal guardian, or the office may at any time petition the court to adjust the amount of a child support order if there has been a substantial change in circumstances.

(b) For purposes of Subsection (7) (a), a substantial change in circumstances may include:

- (i) material changes in custody;
- (ii) material changes in the relative wealth or assets of the parties;
- (iii) material changes of 30% or more in the income of a parent;
- (iv) material changes in the ability of a parent to earn;
- (v) material changes in the medical needs of the child; and
- (vi) material changes in the legal responsibilities of either parent for the support of others.

Utah Code Ann. § 78-45-7.2 (7) (a)&(b) (1953 as amended). If the court finds such a change in the circumstances, it must "then determine whether the change results in a difference of 15% or more between the amount of child support ordered and the amount that would be required under the guidelines. If there is such a difference and the difference is not of a temporary nature, the court shall adjust the amount of child support ordered to that which is provided for in the guidelines." Id. at § 78-45-7.2 (7) (c).

B. APPLICATION TO ERICH DIENER:

As set forth above, the Erich Diener's situation has substantially changed. At the time of the divorce, he was employed full time in the military earning approximately \$1,700.00 gross per month (salary plus housing allowance). Transcript, p. 17-18. His current gross income from part-time work at The Gateway Academy is approximately \$1,032.00, monthly. The difference, is a forty percent (40%) decrease in Mr. Diener's income.⁸

There are additional substantial changes to Mr. Diener's circumstances, and his ability to earn. Mr. Diener worked briefly for Circuit City (Transcript, p. 18); he was employed by TEKsystems (Transcript, p. 18-19); he was terminated from TEKsystems as the result of a reduction in force (Transcript, p. 19); and he has been unsuccessful locating similar employment without a college degree (Transcript, p. 19-21). Mr. Diener returned to college in pursuit of a Bachelor's Degree. Transcript, p. 21 & 28. As noted, he is currently employed by The Gateway Academy, a residential treatment center for teenage boys. Transcript, p. 26. He earns approximately \$10.00 per hour

⁸ Including Mr. Diener's income from the Utah National Guard translates to a 25% decrease in income.

and works about 24 hours a week on the graveyard shift.

Transcript, p. 27.

The lower court made the following findings, comporting with Mr. Diener's testimony:

[Mr. Diener] was temporarily employed by Circuit City, . . . making about \$1,200.00.

[Mr. Diener] was employed by TEKsystems . . . , from July 1998 through September 2001 [He lost said] job because of the down-turn of the economy and the computer technology industry.

[Mr. Diener] was unemployed from September 2001 through November 2001.

[Mr. Diener] was employed at Tucci's restaurant from November 2001 through October 2002, earning approximately \$1,560.00 per month, including tips.

* * *

[Mr. Diener] worked on contract for TEKsystems . . . in 2002. He earned a total of \$3,655.00

* * *

[Mr. Diener] has provided technical computer assistance and consulting to the Utah Legal Clinic in trade for legal services . . . [totaling \$1,200.00 in 2001 and \$1,912.50 in 2002].

* * *

[Mr. Diener] enlisted in the Utah National Guard in 2002. [He] earns approximately \$245.00 per month.

[Mr. Diener] began working part-time for Gateway Academy * * * [His] gross income is approximately \$1,032.00 per month

3/25/2003 Order, p. 3-4 (R. 204-205) (numbering omitted).

Finally, the court specifically found that Mr. Diener requires a

college degree "to again obtain gainful employment at a reasonable rate of pay." 3/25/2003 Order, p. 4 (R. 205).

In spite of the evidence and the specific findings, the court concluded that Erich Diener's "financial circumstances have not changed substantially" 3/25/2003 Order, p. 6 (R. 207). Such a conclusion is erroneous. Erich Diener's financial circumstances have changed substantially. His ability to earn has been substantially altered, and his earnings have significantly decreased.

The court's erroneous conclusion may stem from Mr. Diener's stipulation regarding the amount to be used for the child support calculation. Mr. Diener stipulated that the amount of \$1,750.00 could be used for the purpose of calculating child support, if the court found basis for modification.⁹ Transcript, p. 29. The purpose behind Mr. Diener's stipulation was to facilitate settlement/resolution of this matter, and to benefit his child. Erich Diener testified that he did not actually earn that amount. Transcript, p. 29. That amount represented what he would earn if he were able to work full-time at The Gateway Academy.

⁹ By so stipulating, Mr. Diener did not waive his right to claim a substantial change in circumstances. He should be permitted to request modifications pursuant to §§ 78-45-7.2(6)&(7) (1953 as amended). Mr. Diener did not stipulate that amount be used to determine whether there was a change in his earnings.

C. APPLICATION TO TIFFANY DIENER:

The trial court erred in its narrow application of Utah Code Ann. § 78-45-7.2(7) (1953 as amended) solely to Erich Diener's financial circumstances and not the overall change in both parties' circumstances. There have been substantial changes in both parties' lives. Indeed, the lower court made specific findings that should have resulted in a legal conclusion that there are substantial changes in Tiffany Diener's circumstances. The court found that Ms. Diener was employed as a nanny, earning \$1,192.00 plus room and board at the time of the divorce. 3/25/2003 Order, p. 5. The court also found that Ms. Diener is now unemployed and pursuing a college degree full time. 3/25/2003 Order, p. 5. Nevertheless, the court failed to conclude that there were substantial changes to Ms. Diener's circumstances, and thus the parties' circumstances.

In light of the overall, substantial change in the parties' circumstances, the lower court erred in failing to recalculate child support pursuant to the guidelines.

IV. THE BEST INTERESTS OF THE CHILD CAN BE MET BY A REDUCTION OF CHILD SUPPORT.

The court below found "no substantive evidence before the Court that reducing the child support in this matter would be in the best interests of the parties' minor child. 3/25/2003 Order,

p. 5 (R. 206). While most would agree that an increase of child support would always be in the best interest of the child, this Court must consider whether it would ever be in the best interests of the child to decrease child support. See generally Transcript, p. 80-81 ("[C]an you conceive of a situation where reducing someone's child support would be in the best interest of the child?").

The plain reading of §§ 75-78-45-7.2(6)&(7) (1953 as amended) shows that the legislature drafted the provisions with the intention that modifications to child support could be calculated to either increase or decrease. Nevertheless, there is some friction in §§ 75-45-7.2(6)&(7). The first section reads, in part, "Upon receiving a petition under Subsection (6)(a), the court shall, taking into account the best interests of the child, determine whether there is a difference between the amount ordered and the amount that would be required under the guidelines." Utah Code Ann. § 75-45-7.2(6)(b) (1953 as amended). The second section reads, in part, "Upon receiving a petition under Subsection (7)(a), the court shall, taking into account the best interests of the child, determine whether a substantial change has occurred." Utah Code Ann. § 75-45-7.2(7)(c) (1953 as amended).

This appears to be an issue of first impression in Utah. Thus, an examination of states with similar statutory provisions is warranted. Several states have incorporated the "best interests of the child" standard into requirements for modification. See generally 16 J. Am. Acad. Matrimonial Law 259. For example, in Kansas, a court may modify child support at any time "as required by the best interests of the child." Kan. Stat. Ann. § 38-1121 (c). In Nevada, one may request a review every three (3) years. The court, may modify child support if it determines a modification is appropriate, while "taking into account the best interests of the child" Nev. Rev. Stat. § 125B.145.

Florida, however, appears to be the first state to have specifically examined the meaning of the term "the best interests of the child," and allowed modification purely on that basis. In Florida, a court may modify child support when adjustment is found necessary "in the best interests of the child." Florida Stat. Ann. § 61.13(1)(a).

In Wood v. Wood, 272 So.2d 14 (Fla. 3d DCA 1973), the District Court of Appeal of Florida recognized that the Florida legislature had broadened the basis on which modification may be awarded. In Wood, an obligor father argued that an ordered increase in child support was unfair because there had been no

substantial change in the parties' circumstances. Id. The court rejected this argument. Id. at 15. In so doing, the appellate court affirmed the lower court's finding that modification was appropriate when necessary for the best interests of the child. Id. The Wood court, thus, construed § 61.13 to provide two (2) distinct basis to modify: 1) when necessary "for the best interests of the child," and 2), "when . . . there has been a substantial change in circumstances." Id. at 14 n.1.

Two (2) decades later, the Florida judiciary discussed whether a child support reduction could be in the best interests of the child. In Overby v. Overby, 698 So.2d 811 (Fl. 1997) the obligor parent decided to attend law school, and sought to modify child support. Id. at 112. The children were ten (10) and (16) when the modification action was brought. Id. at 115. Based upon these facts, the court found that the decision to attend law school did not sustain decreased child support. Id. The Court reasoned that the children would be too old when the obligor graduated, and thus would not benefit from a potential increased earnings. Thus, the Overby court rejected the lower court's finding that it was in the "best interests of the children" to reduce child support. Id.

Nevertheless, the Overby court addressed a broader issue of reduction in child support. The court recognized that a "need

for retraining when a skill is no longer needed and the need for increased education to enhance income [could be] important factors that may be considered [in reducing child support]." Id.

Prior to Overby, the analysis to reduce child support had been whether a return to school, reduction in income, etc., was voluntary or involuntary. Id. at 814. In Overby, however, the Florida judiciary resolved that "the focus should be whether the temporary reduction will be in the best interests of the [child]." ¹⁰ Id. The Overby court opined that a temporary reduction would be permissible if the long term effect would benefit the children. Given the right facts, Florida courts will find a reduction in child support is in the best interests of the child if the minor child will ultimately benefit from the intervening factors.¹¹

Other jurisdictions, geographically closer to Utah, have not entirely adopted Florida's analysis. Arizona examines whether the parent's decision to return to school is voluntary or as the

¹⁰ The court affirmed, "We . . . disapprove the [previous] opinions . . . to the extent they rely on a voluntary/involuntary rather than best interests analysis to justify or deny a requested reduction in child support payments." Overby, 698 So.2d at 815.

¹¹ "In light of today's fast paced changing age of technology, trial judges will have to evaluate, on a case by case basis, whether a temporary reduction in child support payments due to a payor's pursuit of an enhanced education will eventually be legally beneficial to the recipients." Overby, 698 So.2d at 815.

result of involuntary unemployment. Little v. Little, 975 P.2d 108, 111 (Ariz. 1999). Nevertheless, Arizona has recognized the importance of a temporary modification of a child support that may lead to long term economic benefit for the child. Id. at 112. In Little, the Supreme Court of Arizona found a father was not entitled to decreased child support when he voluntarily resigned a commission in the Air Force to pursue a law degree. Id. at 114. The court reasoned: 1) there was no evidence the father would earn more with a law degree, and 2) there was no evidence the father attempted to obtain any employment to fulfill his financial obligations. Id.

Nevertheless, the court declined to adopt a strict test that would only look "at the earning capacity of a party in fashioning a support obligation." Id. at 112 (citing Lewis Becker, Spousal and Child Support and the "Voluntary Reduction of Income" Doctrine, 29 Conn. L. Rev. 647, 658 (1997)). Such a test allows "no consideration of the parent's individual freedom or of the economic benefits that can result to both parent and child from additional training or education." Id.

Where a parent's voluntary decision to terminate employment and return to school does not place the children in peril, the court must consider the overall reasonableness of the parent's decision. Id. Given the right facts, Arizona will allow a child

support reduction where a parent voluntarily changes employment status to further education.

Idaho, adopts a more myopic test, simply looking at whether the decrease in income was voluntary or involuntary. Idaho has declined to look toward long term benefits to the child. In Humberger v. Humberger, 995 P.2d 809 (Idaho 2000), the Supreme Court of Idaho denied a wife's petition to reduce child support. The court affirmed a lower court's finding that the wife was voluntarily unemployed based on her decision to attend college. Id. at 812. The wife lost a job as a waitress, and could not find sufficient employment to provide for herself and her two children. Id. at 811-812. Thus, she decided to seek a college degree. Id. at 812. The court did not consider the long term economic benefits of improved education and instead ratified a strict test as to whether the reduction in income was voluntary or involuntary. Id.

In application herein, Erich Diener is neither voluntarily unemployed, nor voluntarily underemployed. Indeed, the trial court specifically found that Mr. Diener requires a college degree "to again obtain gainful employment at a reasonable rate of pay." 3/25/2003 Order, p. 4 (R. 205). In determining the best interests of the child, this Court should allow a reduction in child support based upon the facts herein. This Court should

determine that an obligor's decision to return to school might ultimately benefit the child, by adopting a long term view of greater earning capacity. In addition, involuntary unemployment or underemployment should not weigh against the obligor.

V. AN INJUSTICE WILL BE PERPETRATED UPON MR. DIENER IF THE TRIAL COURT'S RULING IS ALLOWED TO STAND.

Tiffany Diener depleted her trust account prior to the marriage. She asserts, however, that Erich Diener assisted in the depletion of that account. Pursuant to the lower court's ruling, Mr. Diener is ordered to pay a child support in excess of the guidelines perhaps until the child reaches the age of majority as "repayment."

Based upon the trial testimony, at best the court may have found that Erich Diener depleted funds from Tiffany's trust in the amounts of \$5,000.00 for tuition/plane ticket, and \$2,400.00 for the purchase of the truck.¹² Tiffany Diener testified that Erich Diener repaid \$1,200.00 when he sold the truck. Assuming arguendo Ms. Diener's account to be accurate, the most debt she proved at trial was \$6,200.00, all incurred prior to the

¹² The court made no such findings.

marriage.¹³ Nevertheless, the lower court's order forces Mr. Diener to repay that debt several times over.

Simple math demonstrates this principle. Child support is set at \$400.00. Pursuant to the court's ruling, Mr. Diener can never adjust that amount. Pursuant to the Utah guidelines, and based upon the parties' incomes, child support should be \$234.00. Thus, Erich Diener is paying \$166.00 "extra" per month in child support. In roughly three (3) years, Erich will have "repaid" Tiffany Diener the \$6,200.00 that she asserted at trial (again, assuming *arguendo* that such debts existed prior to the marriage). After repayment, Tiffany Diener will be unjustly enriched by continued, excessive child support. No finding of the court supports such a scheme. A court in equity should not support such a scheme. An injustice will be perpetrated upon Mr. Diener if the lower court's ruling is allowed to stand.

CONCLUSION AND RELIEF SOUGHT

The lower court erred in denying Erich Diener's request to modify the decree to adjust child support. Erich Diener is entitled to an adjustment in child support pursuant to Utah law after the passage of three (3) years. Furthermore, Erich Diener

¹³ No finding could be made that Erich Diener depleted the trust account during the marriage, because Tiffany Diener testified the fund was gone prior to the marriage.

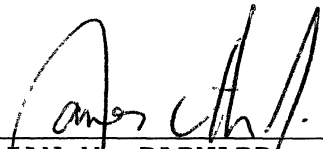
is entitled to a modification based upon the substantial change in the parties' circumstances. Finally, the lower court erred in finding a bargained-for exchange of alimony for increased child support, particularly in light of the fact that no such evidence of said bargain is found in the parties' original divorce papers.

The lower court should recalculate child support pursuant to the guidelines, based upon the parties' income, and order Erich Diener to pay the resulting amount.

RESPECTFULLY SUBMITTED this 2nd day of OCTOBER 2003.

UTAH LEGAL CLINIC
ATTORNEYS FOR RESPONDENT/APPELLANT

by


BRIAN M. BARNARD
JAMES L. HARRIS, Jr.

ORAL ARGUMENT REQUESTED

These issues implicate important rights affecting non-custodial parents and their child support obligations. One particular issue appears to be one of first impression in the State of Utah. Appellant believes that oral argument will give the parties a beneficial opportunity to explain their respective positions and to answer questions from the Court.

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed four (4) true and correct copies of the foregoing BRIEF OF APPELLANTS to:


JOHN W. CALL
NYGAARD, COKE & VINCENT, L.C.
Attorneys for APPELLEE
333 North 300 West
Salt Lake City, Utah 84103

and

MADELYN M. IBARRA
TAMMY R. WEIS
BEVERLY A. BORTOLUSSI
CARLA M. FULLER
ORS Agents
STEPHANIE SAPERSTEIN
Attorney for Office of Recovery Services
P.O. BOX 45011
Salt Lake City, Utah 84145-0011

on the 2nd day of OCTOBER, 2003, postage prepaid in the United States Postal Service.

UTAH LEGAL CLINIC
Attorneys for RESPONDENT/APPELLANT

by: 
BRIAN M. BARNARD
JAMES L. HARRIS, JR.

APPENDIX/ATTACHMENTS

Attachment "A": Petition to Modify (R. 43).

Attachment "B": Findings of Fact, Conclusions of Law and Order (R. 202).

Attachment "C": Decree of Divorce (R. 33).

Attachment "D": Stipulation and Settlement Agreement (R. 10).

Attachment "E": Original Findings of Fact and Conclusions of Law (R. 26).

ATTACHMENT A

Petition to Modify (R. 43).

BRIAN M. BARNARD USB # 0215
JAMES L. HARRIS, Jr. USB # 8204
UTAH LEGAL CLINIC
Attorneys for Defendant
214 East Fifth South Street
Salt Lake City, Utah 84111-3204
Telephone: (801) 328-9531

CLERK OF DISTRICT COURT
SALT LAKE COUNTY
BY *E. Burrows*
DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY STATE OF UTAH
SALT LAKE DEPARTMENT

TIFFANY JACOBS DIENER,	:	PETITION
Plaintiff,	:	TO MODIFY DECREE
vs.	:	Case No. 98-490-1948 DA
ERICH ROSS DIENER,	:	
Defendant.	:	(Hon. F. NOEL)

THE DEFENDANT, ERICH ROSS DIENER, by and through counsel,
Brian M. Barnard makes this Petition Seeking to Modify the Decree
of Divorce entered herein and in support of that petition states
as follows:

1. The parties were divorced and a decree entered herein on
April 17, 1998.

2. The decree awarded to plaintiff child support for the
one minor child of the parties at the rate of four hundred
dollars (\$400.00) per month.

3. Since the entry of the decree, there has been a substantial change in the circumstances of both parties. The plaintiff is now unemployed and a full time student. The defendant was laid from his employment at Teksystems, an information technology and computer consulting firm. Defendant has been unable to find a comparable job at comparable pay. The defendant has taken a full time evening job anticipating that he will attend the University of Utah on a full-time basis beginning in January 2002 to earn a Bachelors of Science degree. A degree is necessary for defendant to re-gain comparable employment in the computer industry. He believes that it will take him two (2) years to complete the requirements for that degree.

4. Defendant's current monthly income is \$1,560.00 per month including tips. Plaintiff's current monthly income is -0- per month. Based upon the foregoing, defendant's monthly child support obligation should be two hundred thirty-four dollars (\$234.00) per month and plaintiff's monthly child support obligation should be -0- per month.

5. The decree required defendant to maintain life insurance on his life of \$200,000.00. In light of his change in jobs such insurance is no longer available to defendant. The decree should be modified to require maintenance of such insurance only as available through a parties' employer.

6. The decree required the creation and maintenance of a

college fund for the child. Neither party has done so. In light of the current circumstances of the parties, the requirement to create and maintain such a fund should be suspended.

7. The decree of divorce provides that the plaintiff shall be allowed to claim the minor child as a dependent for income tax purposes. In light of the other modifications as set forth above, the parties should be allowed to claim the child on their respective tax returns in alternating years: plaintiff for even numbered tax years and defendant for odd numbered tax years. For the years in which plaintiff is so allowed to claim the child, the defendant should be allowed to "purchase" that right from plaintiff. To do so, on or before March 15th of the year in which the tax return is due, plaintiff would calculate her taxes for the applicable tax year in two ways: first with claiming the child and the second time with her not claiming the child. Within ten (10) days of receipt of those two (2) tax returns, defendant would be allowed to purchase from the plaintiff the right to claim the child for that tax year, by payment of the amount plaintiff would "lose" by not claiming the child. Upon receipt of that payment, plaintiff would execute and deliver to the defendant, the necessary tax form to allow defendant to so claim the child.

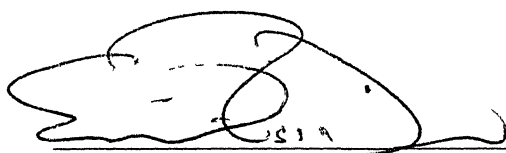

8. The decree of divorce should be modified and amended to recalculate defendant's child support obligations, etc. in light

of the substantial change of circumstances of both parties.

WHEREFORE, the decree of divorce should be modified as set forth above.

Dated this 3rd day of DECEMBER 2001.

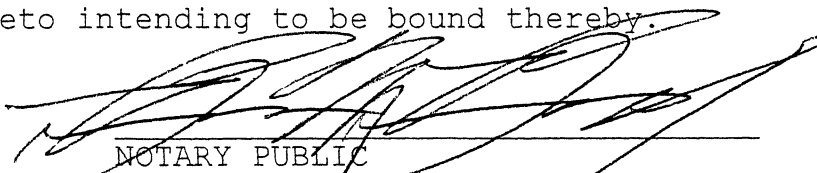
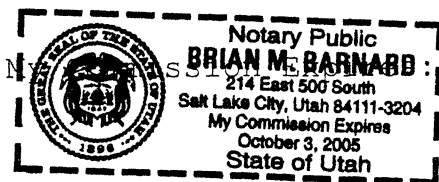
UTAH LEGAL CLINIC
Attorneys for DEFENDANT


ERICH ROSS DIENER
by BRIAN M. BARNARD

VERIFICATION AND ACKNOWLEDGMENT

STATE OF UTAH :
: SS.
COUNTY OF SALT LAKE :

THE ABOVE NAMED PARTY, ERICH DIENER, personally appeared before me, a notary public, on the date above written, and having been duly sworn upon oath acknowledged to me that he was the person that had executed that above and foregoing document, having read and understood it, and knowing the contents thereof, swearing that the contents are true, and having voluntarily subscribed his name thereto intending to be bound thereby.


NOTARY PUBLIC
State of Utah

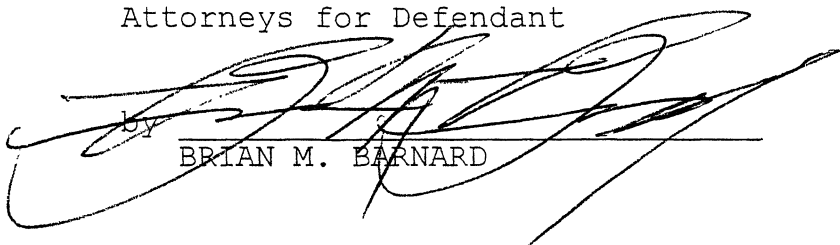
CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing PETITION FOR MODIFICATION to:

TIFFANY JACOBS DIENER
Plaintiff PRO SE
1464 University Village
Salt Lake City, Utah 84108

on the 3RD day of DECEMBER 2001, postage prepaid in the United States Postal Service.

UTAH LEGAL CLINIC
Attorneys for Defendant

by 
BRIAN M. BARNARD

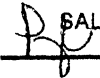
C:\Domestic\DIENER mod PET.wpd/BMB

ATTACHMENT B

Findings of Fact, Conclusions of Law
and Order (R. 202).

FILED DISTRICT COURT
Third Judicial District

MAR 25 2003

By  SALT LAKE COUNTY
Deputy Clerk

JOHN W. CALL, USB #0542
NYGAARD, COKE & VINCENT, L.C.
Attorneys for Petitioner Tiffany
Jacobs Diener
333 North 300 West
Salt Lake City, Utah 84103
Telephone: (801) 328-2506
Facsimile: (801) 364-6403

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, FOR THE STATE OF UTAH

TIFFANY JACOBS DIENER,	)	FINDINGS OF FACT, CONCLUSIONS
	)	OF LAW AND ORDER
Petitioner,)	
)	
)	
	)	Civil No. 984901948 DA
ERICH ROSS DIENER,)	
	)	Honorable Frank G. Noel
Respondent.	)	Commissioner Michael Evans

Defendant Erich Ross Diener's Petition to Modify Decree of Divorce came on for trial on February 6, 2003 before the Honorable Frank G. Noel, District Judge presiding. Petitioner was present and represented by his attorney, Brian M. Barnard. The Respondent, Tiffany Jacobs Diener, was present and represented by her attorney, John W. Call. Each of the parties had submitted a trial memorandum prior to trial which memoranda were reviewed by the Court. The Court heard argument and the testimony of the parties. Therefore, being thus duly advised in the premises, the Court hereby makes and enters the following

FINDINGS OF FACT

1. Prior to Ms. Diener's filing of the Petition for Divorce in this matter, she and Mr. Diener agreed that the Mr. Diener would pay child support in the amount of \$400, which both parties knew was higher than the child support guidelines.

2. The higher child support amount was a bargained-for consideration where each of the parties made significant concessions in reaching that agreement. Ms. Diener agreed not to pursue claims for alimony or additional property settlement, based upon Mr. Diener's use of Ms. Diener's pre-marital assets, and Mr. Diener agreed to pay a higher monthly child support amount in order to be relieved of the risk of such claims by Ms. Diener being successful.

3. The parties were divorced and a Decree entered herein by stipulation on April 17, 1998. More than three (3) years have elapsed since entry of the decree. The Court takes judicial notice of the parties' settlement stipulation filed herein and dated March 23, 1998.

4. Paragraph 3 of the Decree awarded to Plaintiff child support for the one minor child of the parties at the rate of four hundred dollars (\$400.00) per month. The child support awarded in the original decree exceeded the Utah Child Support Guidelines.

5. Although Mr. Diener earned as much as \$55,000.00 annually since the divorce was granted, Mr. Diener agreed that his present income may be imputed to be \$1,750 per month for the purposes of child support, slightly greater than the \$1,700 per month income he was receiving at the time of the parties' divorce.

6. Defendant was temporarily employed by Circuit City as a computer sales person making about \$1,200.00 gross per month from April 1998 through June 1998.

7. Defendant was employed by TEKsystems, an information technology and computer consulting firm, from June 1998 through September 2001. Defendant was hired at \$12.00 per hour. In September 2001, a reduction in force occurred and the Defendant was laid off. The Defendant's salary at that time was \$55,000.00 annually. He lost that job because of the down-turn of the economy and the computer technology industry.

8. Defendant was unemployed from September 2001 through November 2001.

9. Despite searching, Defendant has been unable to find employment with income comparable to TEKsystems.

10. Defendant was employed by Tucci's restaurant from November 2001 through October 2002 earning approximately \$1,560.00 per month including tips. Defendant was hired as a part-time bartender earning \$7.25 per hour plus tips (income averaged to be \$10.00 per hour). The Defendant worked approximately 15 hours per week. Defendant also tried to pick up additional hours (15-20 hours per week) as a server at which he earned a similar hourly rate. Defendant took this job because it allowed him to attend the University of Utah during the day.

11. Defendant worked on contract for TEKsystems for approximately 20 hours a week for a few months in 2002. He earned a total of \$ 3,655.00 from TEKsystems in 2002. On a part-time basis, he helped with the installation of a computer system.

12. Defendant has provided technical computer assistance and consulting to Utah Legal Clinic in trade for legal services in representing Defendant in this action. Credit has been given at the rate of twenty-five dollars (\$25.00) per hour for work performed. For the year 2001, as an independent contractor, Defendant provided a total of \$1,200.00 in services to Utah Legal Clinic. For the year 2002, Defendant provided a total of \$1,912.50 in services to Utah Legal Clinic. Internal Revenue Service form 1099's have been provided to Defendant by Utah Legal Clinic in those amounts for those years.

13. Defendant enlisted with the Utah National Guard in 2002. His work obligation is one (1) weekend per month. Defendant earns approximately \$245.00 gross per month from the guard.

14. Defendant began working part-time for Gateway Academy on January 26, 2003 as a Milieu Manager. He supervises teenagers in a residential facility. The Defendant is working approximately 24 hours per week and is working the graveyard shift. The Defendant is earning \$10.00 per hour. The Defendant's gross income is approximately \$1,032.00 per month ($\$10.00 \times 24 \text{ hrs.} \times 4.3 \text{ weeks} = \$1,032.00$). Defendant has no benefits, no insurance, etc. from that employment.

15. Defendant is and has been a full time student at the University of Utah since January 2002 working towards a Bachelors degree. A degree is necessary for Defendant to again obtain gainful employment at a reasonable rate of income. The current plan is that he will complete his degree in the Spring of 2004.

16. Ms. Diener is now unemployed and a full time University of Utah student and currently earns no income. Plaintiff is capable of employment. Her plan is to complete her degree in approximately two (2) years. The parties' child, Zoe is in elementary school and attends school for a full school day.

17. Ms. Diener was earning \$1,192.00 per month and receiving free room and board for herself and her daughter for work as a nanny when the divorce Decree was entered.

18. There is no substantive evidence before the Court that reducing the child support in this matter would be in the best interest of the parties' minor child.

19. Since the Decree of Divorce was entered, the parties have made little contribution to a college fund for the parties' minor child.

WHEREFORE, having made the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. Because the parties made concessions and bargained for a higher child support amount prior to the divorce, and because Mr. Diener's imputed income is slightly greater than his income at the time the divorce was granted, it would be inequitable to apply the provisions of § 78-45-7.2(6), Utah Code, to reduce Mr. Diener's child support obligation, inasmuch as doing so would provide Mr. Diener with the benefits of the bargain without requiring its corresponding obligations.

2. Because the Defendant's financial circumstances have not changed substantially, the Court finds that there is no substantial change in circumstances upon which to justify modification of the child support Order under § 78-45-7.2(7), Utah Code.

3. There are insufficient changes in the parties' relative income earning ability to justify permitting Mr. Diener to claim the parties' minor child as a dependent for tax deduction purposes in alternating years. However, it would be equitable, and Ms. Diener has agreed, to modify the Decree to allow Mr. Diener to purchase the right from Ms. Diener the right to the child's dependent tax deduction in each tax year that he wishes to do so by first paying to Ms. Diener sufficient funds to compensate her for any greater tax burden as a result of her not being able to use the tax deduction in that year.

4. The Court finds that it would be equitable to modify the Decree that the parties be required to obtain life insurance coverage for their lives for the benefit of the parties' minor child, but only if it is available from their employers at reasonable cost.

5. The Court finds that it would be equitable to modify the Decree to suspend the provision in the Decree of Divorce that requires a 5% contribution of the parties' income to a college fund for the benefit of the parties' minor child.

6. The Court finds that it would be fair and equitable that each of the parties be required to bear their own attorneys' fees and costs incurred in this matter.

WHEREFORE, the Court, having made and entered the foregoing Findings of Fact and Conclusions of Law, hereby orders as follows:

1. Mr. Diener's Petition to Modify the child support provisions of Paragraph 3 of the Decree of Divorce is hereby denied.

2. Mr. Diener's Petition to Modify the tax deduction provisions of Paragraph 14 of the Decree of Divorce is denied as to his request regarding alternating years. However, it is hereby ordered that Paragraph 14 is modified to allow Mr. Diener to purchase the right to take the tax deduction in each tax year that he wishes to do so by first paying to Ms. Diener the sufficient funds to compensate her for any greater tax burden as a result of her not being able to use the tax deduction in that year.

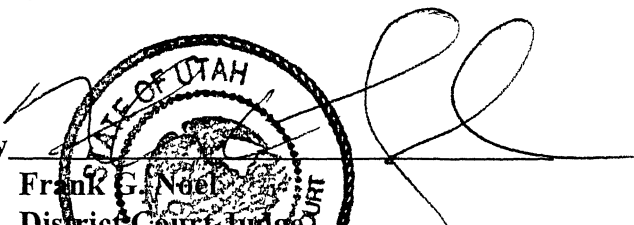
3. Mr. Diener's Petition to Modify the Decree in order to suspend the requirement in Paragraph 7 that the parties contribute a percentage of their income to a college fund account is hereby granted.

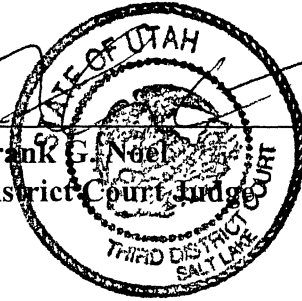
4. Mr. Diener's Petition to Modify Paragraph 5 of the Decree regarding the maintenance of life insurance coverage is hereby granted. Each party is now required to obtain such life insurance, for the purposes and in the amounts stated in Paragraph 5 of the Decree, only if it is available from the parties' employers at a reasonable cost.

5. Each party is to bear their own costs and attorneys' fees incurred herein.

DATED this 25 day of March, 2003.

BY THE COURT

By 
Frank G. Noel
District Court Judge

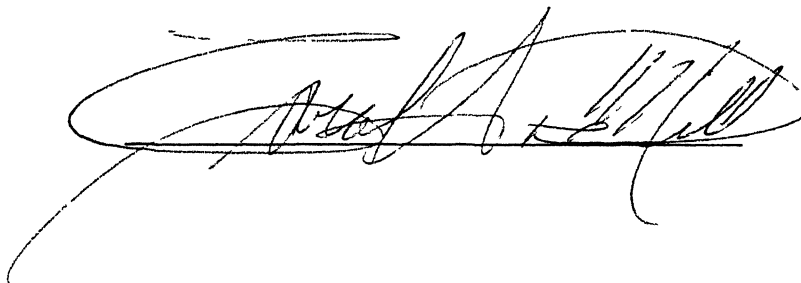


*re Court has
covered the second set
of objections & findings
& denies the same.
Non*

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing
Findings of Fact, Conclusions of Law and Order this 27th day of March, 2003, by U. S. Mail,
postage prepaid, to the following:

Brian M. Barnard
James L. Harris, Jr.
Utah Legal Clinic
Attorneys for Respondent Erich Ross Diener
214 East Fifth South Street
Salt Lake City, Utah 84111-2304



ATTACHMENT C

Decree of Divorce (R. 33).

APR 17 1998

Marilynn Burningham (#4571)
NIELSEN & SENIOR, P.C.
60 East South Temple, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 532-1900

SALT LAKE COUNTY
By Deputy Clerk Helen J. Paulsen

JUDGEMENT

Attorneys for Petitioner

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TIFFANY JACOBS DIENER,	)	2222219
	)	4-29-98
Petitioner,	)	DECREE OF DIVORCE
)	
vs.	)	Civil No. 984901948DA
)	
ERIC ROSS DIENER,	)	Judge Frank Noel
)	
Respondent.)	

The parties have entered into a Stipulation providing that Eric's default be entered and Tiffany awarded a Decree of Divorce pursuant to its terms. The Court has entered Eric's default, reviewed the records, files and papers in this matter and received the testimony of Tiffany as to jurisdiction and grounds. Having received Tiffany's testimony that the Findings of Fact, Conclusions of Law and Decree of Divorce conform to the parties' Stipulation, and having entered the Findings of Fact and Conclusions of Law, the Court now

ORDERS, ADJUDGES AND DECREES as follows:

1. The bonds of matrimony between the parties are dissolved, and Tiffany is awarded a Decree of Divorce from Eric to become final upon entry by the Court.

2. Tiffany and Eric are awarded joint legal custody of the parties' minor child, Zoe-Nicene, born February 19, 1995. Tiffany is awarded physical custody of the child, and Eric is awarded liberal rights of visitation. In addition:

(a) It is ordered that the parties exchange information concerning the health, education and welfare of the child, and where possible, confer before making decisions concerning any of these areas.

(b) It is ordered that each party have direct access to all school reports and medical records and be notified immediately by the other party in the event of a medical emergency.

(c) It is ordered that each party provide the other with a current address and telephone number within 24 hours of any change.

(d) It is ordered that each party permit and encourage liberal telephone contact during reasonable hours.

3. Tiffany is awarded child support in the amount of \$400.00 per month, to be paid each month until Zoe attains the age of 18 years or graduates from high school, whichever occurs last. The child support exceeds that of the Utah Child Support Guidelines, as computed from Eric's income of \$1,700.00 per month and Tiffany's income of \$1,192.00 per month.

4. Petitioner is ordered to obtain and maintain health, dental and accident insurance for the benefit of the parties' minor child. The parties are ordered to share equally all out-of-pocket costs for insurance premiums, deductibles, co-payments, and any medical and dental costs for the minor child which are not covered by insurance. It is ordered that the party who incurs medical and

dental expenses for the benefit of the minor child provide to the other written verification of the expense incurred within 30 days. The receiving party is ordered to make payment of one-half the expense incurred within 30 days of receipt of notification that the expense has been incurred.

5. The parties are each ordered to maintain a life insurance policy for the benefit of the minor child in the face amount of \$200,000.00 for Respondent and \$100,000.00 for Petitioner. Each party is ordered to provide verification that the policy is in force, upon request of the other. It is ordered that, until the parties' minor child reaches the age of 18 years, each party designate the other as beneficiary on said life insurance policy, as trustee for the minor child.

6. The parties agree that the primary and secondary school education of their daughter is of paramount importance to each of them. Thus, it is ordered that extra costs incurred for extracurricular activities or enrichment programs be shared equally.

7. It is ordered that, each year until Zoe-Nicene reaches the age of 18 years, each party contribute five percent (5%) of that party's gross annual income to an account to be used for Zoe's post-secondary educational expenses. It is ordered that these annual contributions not be withdrawn or disbursed until the parties and Zoe agree.

8. The parties are able-bodied and able to provide for their own support, and it is ordered that neither party pay alimony to the other.

9. It is ordered that each party be responsible to maintain that party's medical and dental insurance coverage, and that each be responsible for that party's uninsured medical and dental costs.

10. The parties have divided the personal property acquired during the marriage in an equitable fashion, and each party is awarded the personal property currently in that party's possession.

11. Each party is awarded that party's checking and savings accounts and such retirement or other assets as have been accumulated in that party's name.

12. Each party is ordered to assume and pay all debts and obligations incurred by that party since their separation on November 24, 1997, and to hold the other harmless from any liability thereon. In addition, it is ordered that Petitioner assume and pay the following:

R.C. Willey	
Nordstrom Account	\$ 200.00
Discover Card	\$1,900.00
Citibank Card	\$ 500.00
AAFES	\$ 750.00

It is ordered that Respondent assume and pay the following:

Overdraft, America First	\$ 500.00
Computer Loan	\$3,000.00
Visa Card	\$3,500.00
AAFES	\$ 750.00
Nordstrom Account	\$ 300.00

13. The parties have acquired two vehicles, subject to the balance due on the financing loan from Weber State Credit Union: Petitioner's 1995 Passat and Respondent's 1994 Toyota truck. Each party is ordered to obtain financing on the vehicle on which that party is the sole obligor. It is ordered that the parties obtain separate financing within 21 days of the signing of this Agreement and the Weber State Credit Union loan, which currently has a balance of approximately \$30,000.00, be paid in full.

14. It is ordered that Petitioner be entitled to claim the minor child as an exemption for federal and state income tax purposes.


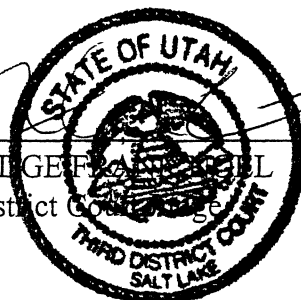
15. Respondent is ordered to assume and pay any additional tax liability arising from transactions occurring or returns filed jointly by the parties during the marriage.

16. The parties are ordered to execute such documents as may be necessary to transfer the property as awarded by the Court to the party entitled thereto.

17. Each party is ordered to pay the attorney fees and costs incurred by that party.

DATED this 17 day of April, 1998.

BY THE COURT:


JUDGE FRANK ANGEL
District Court


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of March, 1998, I did cause a true and correct copy of the foregoing DECREE to be mailed, United States mails, postage prepaid, addressed to the following:

Eric Ross Diener
9828 Emory Road
Fort Mead, Maryland 70755

MKBurningham

ATTACHMENT D

Stipulation and Settlement Agreement (R. 10).

Marilynn Burningham (#4571)
NIELSEN & SENIOR, P.C.
60 East South Temple, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 532-1900

Attorneys for Petitioner

FILED
93 MAR 27 PM 4:13
BY *BK*

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TIFFANY JACOBS DIENER,

Petitioner,

vs.

ERIC ROSS DIENER,

Respondent.

**STIPULATION AND
SETTLEMENT AGREEMENT**

Civil No. 984901948DA

Judge Frank Noel

Come now the parties and make the following stipulations and agreements for the purpose of settlement of this action and respectfully move the Court to adopt the stipulations and agreements in the final decree of divorce to be entered herein:

DIVORCE

1. Petitioner shall proceed to obtain a decree of divorce from Respondent dissolving the marriage of the parties on the grounds of their irreconcilable differences, to become final upon entry by the Court.

2. Respondent has executed an Acceptance of Service and consents that his default may be entered pursuant to the terms of this Stipulation and Property Settlement Agreement and that this matter may proceed at a time convenient to the Court and counsel.

3. Petitioner is a bona fide and actual resident of Salt Lake County, State of Utah, and has been a resident for more than three months prior to the commencement of this action.

4. Petitioner and Respondent and wife and husband, respectively, having been legally married on July 2, 1994, in Layton, Davis County, State of Utah.

5. Disagreements have ensued between the parties concerning their marriage and their future together; meaningful communication between the parties has ceased; and, notwithstanding attempts by the parties to reconcile and resolve their differences, continuation of the marriage under the circumstances has become impossible.

CUSTODY.

6. The parties have one minor child born as issue of their marriage: Zoe-Nicene Lois Diener, born February 19, 1995, age 3 years.

7. This Court has jurisdiction to enter an order of custody pursuant to the Uniform Child Custody Jurisdiction Act, Utah Code Ann. § 78-45c-3(1)(b) (1987).

8. The parties are fit and proper persons to have joint legal custody of the minor child. Petitioner shall be the primary physical custodial of the child, subject to Respondent's liberal visitation. In addition:

(a) The parties shall exchange information concerning the health, education and welfare of the child, and where possible, confer before making decisions concerning any of these areas.

(b) Each party shall have direct access to all school reports and medical records and shall be notified immediately by the other party in the event of a medical emergency.

(c) Each party shall provide the other with a current address and telephone number within 24 hours of any change.

(d) Each party shall permit and encourage liberal telephone contact during reasonable hours.

CHILD SUPPORT AND RELATED PROVISIONS.

9. Petitioner is currently employed earning \$14,300.00 per year, or \$1,192.00 per month, ^{ERD JGD together with housing}
Respondent is currently serving in the Armed Forces earning \$20,400.00 per year, or \$1,700.00 per month, together with an allowance for housing and other benefits.

10. The parties agree that Respondent shall pay to Petitioner the sum of \$400.00 as base child support, to be paid each month until Zoe-Nicene attains the age of 18 years or graduates from high school, whichever occurs last.

^{JGD ERD}
11. ^{Petitioner} Respondent shall obtain and maintain health, dental and accident insurance for the benefit of the parties' minor child. The parties shall share equally all out-of-pocket costs for insurance premiums, deductibles, co-payments, and any medical and dental costs for the minor child which are not covered by insurance. The party who incurs medical and dental expenses for the benefit of the minor child shall provide to the other written verification of the expense incurred within 30 days. The receiving party shall make payment of one-half the expense incurred within 30 days of receipt of notification that the expense has been incurred.

12. The parties shall each maintain a life insurance policy for the benefit of the minor child in the face amount of \$200,000.00 for Respondent and \$100,000.00 for Petitioner. Each party shall provide verification that the policy is in force, upon request of the other. Until the parties'

minor child reaches the age of 18 years, each party shall designate the other as beneficiary on said life insurance policy, as trustee for the minor child.

13. The parties agree that the primary and secondary school education of their daughter is of paramount importance to each of them. Thus, the parties agree that extra costs incurred for extracurricular activities or enrichment programs will be shared equally.

14. The parties agree that, each year until Zoe-Nicene reaches the age of 18 years, each party will contribute five percent (5%) of that party's gross annual income to an account to be used for Zoe's post-secondary educational expenses. The parties agree that these annual contributions shall not be withdrawn or disbursed until the parties and Zoe agree.

ALIMONY AND RELATED PROVISIONS.

15. This is a brief marriage of 3-1/2 years duration. The parties are able-bodied and able to provide for their own support and neither shall pay alimony to the other.

16. Each party shall be responsible to maintain that party's medical and dental insurance coverage, and each shall be responsible for that party's uninsured medical and dental costs.

PROPERTY AND DEBT DISTRIBUTION.

17. The parties have divided the personal property acquired during the marriage in an equitable fashion and each party is awarded the personal property currently in that party's possession.

18. Each party shall be awarded that party's checking and savings accounts, and such retirement or other assets as have been accumulated in that party's name.

19. Each party shall assume and pay all debts and obligations incurred by that party since their separation on November 24, 1997, and hold the other harmless from any liability thereon. In addition, Petitioner shall assume and pay the following:

R.C. Willey	
Nordstrom Account	\$ 200.00
Discover Card	\$1,900.00
Citibank Card	\$ 500.00
AAFES	\$ 750.00

Respondent shall assume and pay the following:

<i>398</i> Overdraft, America First	<i>\$ 500.00</i>
Computer Loan	\$3,000.00
Visa Card	\$3,500.00
AAFES	\$ 750.00
Nordstrom Account	\$ 300.00

20. The parties have acquired two vehicles, subject to the balance due on the financing loan from Weber State Credit Union: Petitioner's 1995 Passat and Respondent's 1994 Toyota truck. The parties agree that each will obtain financing on which that party is the sole obligor. The parties agree to obtain separate financing within 21 days of the signing of this Agreement and the Weber State Credit Union loan, which currently has a balance of approximately \$30,000.00, shall be paid in full.

MISCELLANEOUS PROVISIONS.

21. Petitioner shall be entitled to claim the minor child as an exemption for federal and state income tax purposes.

22. Respondent agrees to assume and pay any additional tax liability arising from transactions occurring or returns filed jointly by the parties during the marriage.

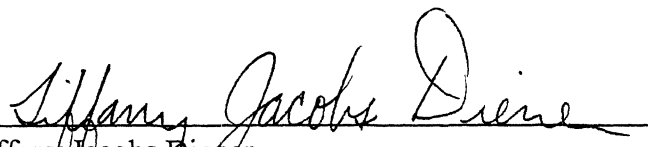
23. Each party shall assume and pay the attorney fees and costs incurred by each in this action.

24. The parties shall execute such documents as may be necessary to transfer the property as awarded by the Court to the party entitled thereto.

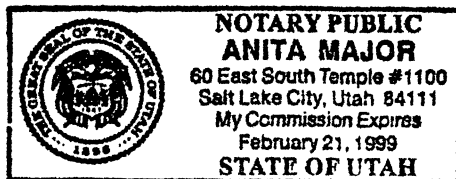
25. The parties have fully and accurately disclosed in this Agreement all real and personal property in which they have an interest, all debts for which they are liable and their incomes. The parties also represent that they have made no transfer or distribution of any funds or property to any third party except in the course of typical and reasonable living and business expenses.

26. The parties represent that, prior to the execution of this Agreement, they reviewed and discussed its terms with their respective counsel, as deemed necessary, and that they believe the Agreement is a fair and equitable distribution of the assets acquired and liabilities incurred by the parties.

DATED this 23rd day of March, 1998.


Tiffany Jacobs Diener

On this 23rd day of March, 1998, personally appeared before me TIFFANY JACOBS DIENER, who, after being duly sworn and upon her oath, deposes and states that she has read the foregoing Agreement, knows and understands its contents, and states that the same is true to the best of her knowledge and that she executes this document as a free and voluntary act for its stated purpose.



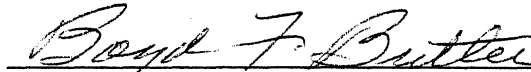
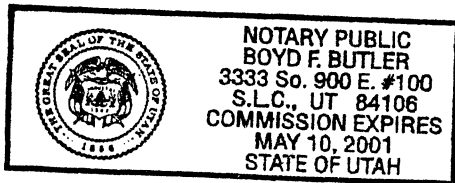

Notary Public

DATED this 23 day of March, 1998.



Eric Ross Diener

On this 23 day of March, 1998, personally appeared before me ERIC ROSS DIENER, who, after being duly sworn and upon his oath, deposes and states that he has read the foregoing Agreement, knows and understands its contents, and states that the same is true to the best of his knowledge and that he executes this document as a free and voluntary act for its stated purpose.



Notary Public

ATTACHMENT E

Original Findings of Fact
and Conclusions of Law (R. 26).

APR 17 1998

SALT LAKE COUNTY
By Deputy Clerk Helen J. Paulsen

Marilynn Burningham (#4571)
NIELSEN & SENIOR, P.C.
60 East South Temple, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 532-1900

Attorneys for Petitioner

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TIFFANY JACOBS DIENER,)	
)	
Petitioner,	)	FINDINGS OF FACT
	)	AND
vs.	)	CONCLUSIONS OF LAW
)	
ERIC ROSS DIENER,	)	Civil No. 984901948DA
)	
Respondent.	)	Judge Frank Noel

The parties to this action, Petitioner Tiffany Jacobs Diener ("Tiffany") and Respondent Eric Ross Diener ("Eric"), have entered into a Stipulation providing that Eric's default be entered and Tiffany awarded a Decree of Divorce pursuant to the terms of the Stipulation. The Court has reviewed the records and papers on file and has received, by affidavit, the testimony of Tiffany as to jurisdiction and grounds and that the proposed Findings of Fact, Conclusions of Law and Decree of Divorce conform to the Stipulation of the parties. Being fully advised in the premises, the Court enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Tiffany is a bona fide and actual resident of Salt Lake County, State of Utah, and has been such for more than three months prior to the commencement of this action.

2. Tiffany and Eric are wife and husband, having been married on July 2, 1994, in Layton, Davis County, State of Utah.

3. Disagreements have ensued between the parties concerning their marriage and their future together; meaningful communication between the parties has ceased; notwithstanding attempts by the parties to reconcile and resolve their differences, the same have been unsuccessful; and, the disagreements have become irreconcilable, making continuation of the marriage under the circumstances impossible.

4. One child has been born as issue of the marriage, namely, Zoe-Nicene Lois, born February 19, 1995.

5. This Court has jurisdiction to enter an order of custody pursuant to the Uniform Child Custody Jurisdiction Act, Utah Code Ann. § 78-45c-3(1)(b) (1987).

6. Both parties are fit and proper persons to have the care, custody and control of Zoe-Nicene, and it is fair and reasonable that they be awarded joint legal custody. Tiffany should be the primary physical custodian of the child, subject to Eric's liberal rights of visitation. In addition:

(a) It is fair and reasonable that the parties exchange information concerning the health, education and welfare of the child, and where possible, confer before making decisions concerning any of these areas.

(b) It is fair and reasonable that each party have direct access to all school reports and medical records and be notified immediately by the other party in the event of a medical emergency.

(c) It is fair and reasonable that each party provide the other with a current address and telephone number within 24 hours of any change.

(d) It is fair and reasonable that each party permit and encourage liberal telephone contact during reasonable hours.

7. Pursuant to the Stipulation of the parties, it is fair and reasonable that Tiffany be awarded child support in the amount of \$400.00 per month, to be paid each month until Zoe reaches the age of 18 years or graduates from high school, whichever occurs last. The child support exceeds that of the child support guidelines, as computed from Eric's income of \$1,700.00 per month and Tiffany's income of \$1,192.00 per month.

8. It is fair and reasonable that Petitioner obtain and maintain health, dental and accident insurance for the benefit of the parties' minor child. It is fair and reasonable that the parties share equally all out-of-pocket costs for insurance premiums, deductibles, co-payments, and any medical and dental costs for the minor child which are not covered by insurance. It is fair and reasonable that the party who incurs medical and dental expenses for the benefit of the minor child provide to the other written verification of the expense incurred within 30 days. It is fair and reasonable that the receiving party make payment of one-half the expense incurred within 30 days of receipt of notification that the expense has been incurred.

9. It is fair and reasonable that the parties each maintain a life insurance policy for the benefit of the minor child in the face amount of \$200,000.00 for Respondent and \$100,000.00 for Petitioner. It is fair and reasonable that each party provide verification that the policy is in force, upon request of the other. It is fair and reasonable that, until the parties' minor child reaches the age

of 18 years, each party designate the other as beneficiary on said life insurance policy, as trustee for the minor child.

10. The parties have agreed that the primary and secondary school education of their daughter is of paramount importance to each of them. Thus, it is fair and reasonable that extra costs incurred for extracurricular activities or enrichment programs be shared equally.

11. Pursuant to the Stipulation of the parties, it is fair and reasonable that, each year until Zoe-Nicene reaches the age of 18 years, each party contribute five percent (5%) of that party's gross annual income to an account to be used for Zoe's post-secondary educational expenses. It is fair and reasonable that these annual contributions not be withdrawn or disbursed until the parties and Zoe agree.

12. The parties are able-bodied and able to provide for their own support, and it is fair and reasonable that neither party pay alimony to the other.

13. It is fair and reasonable that each party be responsible to maintain that party's medical and dental insurance coverage, and that each be responsible for that party's uninsured medical and dental costs.

14. The parties have divided the personal property acquired during the marriage in an equitable fashion, and it is fair and reasonable that each party be awarded the personal property currently in that party's possession.

15. It is fair and reasonable that each party be awarded that party's checking and savings accounts and such retirement or other assets as have been accumulated in that party's name.

16. It is fair and reasonable that each party assume and pay all debts and obligations incurred by that party since their separation on November 24, 1997, and hold the other harmless from any liability thereon. In addition, it is fair and reasonable that Petitioner assume and pay the following:

R.C. Willey	
Nordstrom Account	\$ 200.00
Discover Card	\$1,900.00
Citibank Card	\$ 500.00
AAFES	\$ 750.00

It is fair and reasonable that Respondent assume and pay the following:

Overdraft, America First	\$ 500.00
Computer Loan	\$3,000.00
Visa Card	\$3,500.00
AAFES	\$ 750.00
Nordstrom Account	\$ 300.00

17. The parties have acquired two vehicles, subject to the balance due on the financing loan from Weber State Credit Union: Petitioner's 1995 Passat and Respondent's 1994 Toyota truck. It is fair and reasonable that each party obtain financing on the vehicle on which that party is the sole obligor. It is fair and reasonable that the parties obtain separate financing within 21 days of the signing of this Agreement and the Weber State Credit Union loan, which currently has a balance of approximately \$30,000.00, be paid in full.

18. It is fair and reasonable that Petitioner be entitled to claim the minor child as an exemption for federal and state income tax purposes.

19. It is fair and reasonable that Respondent assume and pay any additional tax liability arising from transactions occurring or returns filed jointly by the parties during the marriage.

20. It is fair and reasonable that the parties execute such documents as may be necessary to transfer the property as awarded by the Court to the party entitled thereto.

21. It is fair and reasonable that each party pay the attorney fees and costs incurred by that party.

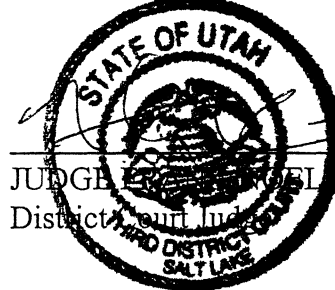
CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties in this matter, and Tiffany is entitled to a divorce on the grounds of irreconcilable differences.

2. A Decree of Divorce shall be entered, consistent with the foregoing Findings of Fact.

DATED this 17 day of April, 1998.

BY THE COURT:



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of March, 1998, I did cause a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to be mailed, United States mails, postage prepaid, addressed to the following:

Eric Ross Diener
9828 Emory Road
Fort Mead, Maryland 70755

MR Birmingham